



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 27, 1994

Mr. Anthony S. Corbett
Hutcheson & Grundy, L.L.P.
Franklin Plaza
111 Congress Avenue, Suite 2700
Austin, Texas 78701-4043

OR94-599

Dear Mr. Corbett:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 27893.

The Southwest Travis County MUD No. 1 ("the MUD") has received a request for "a copy of the laboratory test results from a nationally recognized laboratory which illustrates accuracy claims" received by the MUD from ADS Environmental Services Inc. ("ADS"), the successful bidder for a permanent flow monitoring system. The bidding documents required the submission of such test results. You have submitted a copy of a document entitled "Summary of Independent Testing of ADS Equipment." You assert that this information is excepted from required public disclosure under sections 552.104 and 552.110 of the Government Code.

Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." Section 552.104 is designed to protect the interests of the governmental body as in a competitive bidding situation for a contract or benefit. Open Records Decision No. 592 (1991) at 8. It is not designed to protect the interests of private parties submitting information to a governmental body. *Id.* at 8-9. A governmental body must show some actual or specific competitive harm in a particular competitive situation. Open Records Decision No. 541 (1990) at 4. Once the bidding process has ceased and a contract has been awarded, section 552.104 will generally not except information submitted with a bid or the contract itself from disclosure. Open Records Decision No. 514 (1988).

With respect to section 552.104, you assert that the information "would give an advantage to Macaulay the next time it and ADS bid on the same project." You have not asserted that the release of the information would affect the interests of the MUD. Therefore, as section 552.104 is not designed to protect the interests of private parties, we conclude that it does not protect this information from required public disclosure.

Section 552.110 protects trade secrets from required public disclosure. The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). A trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). There are six factors listed by the Restatement which should be considered when determining whether information is a trade secret:

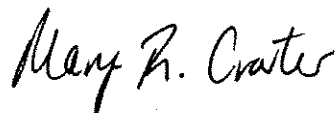
(1) the extent to which the information is known outside of [the company's] business; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and to [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. The governmental body or the company whose records are at issue must make a prima facie case for exception as a trade secret under section 552.110. See Open Records Decision No. 552 (1990) at 5.

In essence, ADS asserts that results of tests of its equipment performed by independent third parties constitute the trade secrets of ADS. We conclude that ADS has failed to establish a prima facie case. Although its contentions regarding each of the six factors lack specificity, we are particularly concerned with ADS' arguments with respect to the critical fourth factor. ADS states that the "invaluable nature of the requested information, to both ADS and its competitors, has been laid out in-depth in [a letter] of July 12, 1994." In that letter, ADS describes the request for this information as a "vain effort to reproduce ADS' patented designs and methods in order to lessen our hard-earned competitive advantage." ADS has failed to explain, however, how the release of the third-party testing information would reveal its patented designs and methods, or otherwise permit its competitors to duplicate its products. In addition, this argument is unpersuasive given that information about patents is generally available through the federal Patent and Trademark Office. *See* 60 AM. JUR. 2d *Patents* § 44. Moreover, ADS has failed to explain how the release of information regarding the superior accuracy of its equipment and methods would undermine its competitive advantage. In sum, ADS has failed to establish the value of this information to itself and to its competitors. Because ADS has failed to establish a prima facie case that the requested information constitutes trade secrets under section 552.110, we conclude that the information must be released.

If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/SLG/rho

Ref.: ID# 27893

Enclosures: Submitted documents

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